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No. 93-1068

In The

Supreme Court of the United States

October Term, 1993

ARMADORES de CABOTAJE, S.A.,

Petitioner,

versus

JERRY YOUNG,

Respondent.

Petition For Writ Of *Certiorari*
To The Louisiana Court Of Appeal
For The Fourth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. The Court should grant *certiorari* to resolve a split in the circuit courts of appeals as to whether a vessel owner's duty to make safe the portions of the ship and ship equipment that it turns over to discharging stevedore, (the "turnover duty" of *Scindia Steam Navigation Co. v. De los Santos*, 451 U.S. 156, 101 S.Ct. 1614 (1981)), extends to cargo loaded by an independent, foreign stevedore. The Fifth and Ninth Circuits, as well as the Louisiana Fourth Circuit, conclude the duty extends to the cargo. The Third Circuit concludes the duty extends only to the vessel and her equipment, not the cargo.

2. The Court should grant *certiorari* to resolve a split in the circuit courts of appeals concerning the duty a vessel owner owes longshoremen employed by a discharging stevedore for personal injuries arising out of the negligent stowage of the cargo by an independent, loading stevedore. The Fifth and Ninth Circuits, as well as the Louisiana Fourth Circuit, conclude vessel owners are liable if they *knew or should have known* of the dangerous condition of the cargo and fail either to correct or warn of the condition, thereby implying a duty to supervise. The Third Circuit concludes vessel owners are liable only if they have *actual knowledge* of the improper stowage and fail either to warn or to correct the condition, recognizing the vessel owner has no general duty to inspect cargo operations at the loading port.

LIST OF PARTIES

The following are the parties to this proceeding:

1. Jerry Young,
   plaintiff-respondent;
2. Armadores de Cabotaje, S.A.,
   defendant-petitioner[1]
3. Empresa Nacional Siderurgica, S.A.,
   defendant;
4. Cooper/T. Smith Stevedoring Co., Inc.,
   intervenor.

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[1] Pursuant to Supreme Court Rule 29.1, Armadores de Cabotaje, S.A. states that it has no parent corporations or non-wholly owned subsidiaries.

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DECISIONS BELOW

The decision of the Louisiana Court of Appeal for the Fourth Circuit is reported at 617 So.2d 517 (La. App. 4th Cir. 1993), and is reproduced in Appendix A. (App. pp. 1a-62a.) On May 12, 1993, the Louisiana Fourth Circuit denied the application for rehearing filed by co-defendant, Empresa Nacional Siderurgica, S.A. (hereinafter "ENSIDESA"), which order is reproduced in Appendix B. (App. p. 63a.)

On October 1, 1993, the Supreme Court of Louisiana denied the applications for writs of *certiorari* filed by petitioner, Armadores de Cabotaje, S.A. (hereinafter "ARCASA"), ENSIDESA, and plaintiff, which denials are reported at 625 So.2d 170-71, and reproduced in Appendix C. (App. pp. 64a-66a.)

JURISDICTION

On March 31, 1993, the Louisiana Fourth Circuit entered judgment from which ARCASA seeks review. On May 12, 1993, the Louisiana Fourth Circuit denied ENSIDESA's application for rehearing.

ARCASA timely filed its application for writ of *certiorari* or review with the Supreme Court of Louisiana, which that Court denied on October 1, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 and Rule 13.4 of the Rules of the Supreme Court.

STATUTORY PROVISION INVOLVED

The following statute of the United States of America is involved in ARCASA's petition:

33 U.S.C. § 905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any arrangements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other

remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

Petitioner, Armadores de Cabotaje, S.A. (hereinafter "ARCASA"), files this supplemental memorandum in support of its petition for writ of *certiorari*, pursuant to Supreme Court Rule 15.7, because this Court recently granted *certiorari* to review an issue identical to that raised by ARCASA.

On December 28, 1993, ARCASA filed its petition for writ of *certiorari* with this Honorable Court, requesting that this Court resolve a split in the circuit courts of appeals concerning the duty a vessel owner owes longshoremen employed by a discharging stevedore for personal injuries arising out of the negligent stowage of the cargo by an independent, loading stevedore. (U.S. S.Ct. No. 93-1068, Petition for Writ of *Certiorari* by ARCASA, pp. i, 16-24.) The Louisiana Court of Appeal for the Fourth Circuit had concluded ARCASA, the vessel owner, was liable to Jerry Young, a longshoreman employed by the discharging stevedore.

The Louisiana Fourth Circuit followed the rule enunciated by the United States Fifth Circuit Court of Appeals in *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied sub nom., Sammiline Co., Ltd. v. Woods*, 493 U.S. 1050, 110 S.Ct. 853 (1990), concerning the vessel owner's standard of conduct. Specifically, if the vessel owner "knew or should have known" that the stowage of cargo by the independent, loading stevedore (ENSIDESA) was

a dangerous condition, the vessel owner has a duty to warn or correct the condition or be held liable. *Young*, 617 So.2d at 528 (App. p. 21a.)

As ARCASA raised in the district court, the court of appeal, the Louisiana Supreme Court, and discussed in its petition for *certiorari*, this conclusion conflicts with the U.S. Third Circuit opinion in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988). The Third Circuit concludes the vessel owner has no general duty to inspect or supervise cargo operations and thus should be liable, if at all, for negligently stowed cargo only upon attaining actual knowledge of the hazard. *Id.* at 496. Thus, if the Third Circuit's interpretation of the law was found to be controlling, ARCASA would have no liability.

SUMMARY OF THE ARGUMENT

Since filing of ARCASA's petition for writ of *certiorari*, this Court has granted *certiorari* to review the identical issue for which ARCASA seeks review.

ADDITIONAL REASON FOR GRANTING THE WRIT

On January 10, 1994, this Court granted a petition for *certiorari* in *Howlett v. Birkdale Shipping Co., S.A.*, 62 U.S.L.W. 3336 (U.S. Jan. 10, 1994) (No. 93-670). The Court there limited its writ of *certiorari* to the following issue: "Does not the ship owner's duty of care owed to a longshoreman under § 5(b) of the Longshore and Harbor Workers' Compensation Act extend to unsafe conditions existing in a cargo stow of which the ship owner knows or has reason to know, and which are unknown to the longshoremen and his stevedore employers, are not open and obvious, and would normally be anticipated?" See *Howlett*, Petition for Writ of *Certiorari*, p. i. Howlett, a longshoreman employed by the discharging stevedore, sued Birkdale Shipping Co., S.A. ("Birkdale"), the owner of the M/V PRESIDENTE IBANEZ, for injuries he allegedly received aboard the vessel while unloading cargo stowed by an independent stevedore. Following the precedent of *Derr*, the district court granted summary judgment in favor of Birkdale because the undisputed material facts indicated it lacked *actual knowledge* of the condition of the cargo, which allegedly caused Howlett's injuries. *Howlett*, 1993 A.M.C. 291, 294 (E.D. Pa. 1992). The Third Circuit affirmed without a published opinion. *Howlett*, 998 F.2d 1003 (3rd Cir. 1993) (table).

ARCASA has petitioned this Court for review of the identical controlling issue. Under the Third Circuit's resolution of the issue, ARCASA, like Birkdale, would have no liability because it was without actual knowledge of the loading defect. However, because the Louisiana court applied the Fifth Circuit's interpretation of the law, ARCASA was found liable.

CONCLUSION

ARCASA respectfully submits this Court should grant its petition for a writ of *certiorari* and consolidate this petition with *Howlett* for briefing and argument.

Respectfully submitted,

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